THE AFTEREFFECTS OF ANNULMENT: ALIMONY, PROPERTY DIVISION, PROVISION FOR CHILDREN

When defects existing at the time of the marriage ceremony cause the union to be invalid, annulment is the proper remedy.[1] At common law, alimony, child support, and property division were denied following annulment on the theory that no valid marriage ever existed.[2] The parties had to determine for themselves a proper division of the real and personal property accumulated during the marriage, with the result that the wife could be left destitute. Children of an annulled marriage were illegitimate, and the husband had no duty of support.[3]

In the vast majority of states today, annulment is infrequently used to terminate marriage. In the few states where annulment is widely used, it serves as a means of avoiding restrictive divorce laws.[4] Nevertheless, the use of annulment in other states is not so infrequent as to be negligible.[5]

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1. At common law, civil disabilities such as prior marriage, idiocy and the like made the marriage absolutely void, and no decree was necessary to establish its invalidity. The canonical disabilities—consanguinity, affinity, and physical impotence—merely rendered the marriage voidable. Until a decree could be obtained, the marriage was fully effective. However, modern statutory confusion of the grounds for annulment has made the traditional void-voidable designations practically meaningless as a general distinction. C. FOOTE, R. LEVY & F. SANDER, CASES ON FAMILY LAW 174 (1966); Note, 17 IOWA L. REV. 254 (1932).

2. Fessenden, *Nullity of Marriage*, 13 HARV. L. REV. 110 (1899).

3. *Id.*

4. California and New York account for almost 73 per cent of all annulments in the United States. C. FOOTE, R. LEVY & F. SANDER, *supra* note 1, at 177. The high incidence of annulments is directly traceable to provisions in the divorce laws of the two states. In California remarriage by either party is prohibited for a period of one year following the final divorce decree. CAL. CIV. CODE § 132 (Deering Supp. 1966). This interlocutory provision does not apply to annulments. Until recently New York law made adultery the only ground for divorce. N.Y. DOM. REL. LAW § 170 (McKinney 1964). Furthermore, the guilty party in a divorce action was prevented from remarrying during the lifetime of the other spouse, unless court permission could be obtained. N.Y. DOM. REL. LAW § 8 (McKinney 1964). However, in 1967 the New York legislature revised the state's divorce law and provided five additional grounds for divorce: cruelty, abandonment for two or more years, confinement in prison for three or more years, living apart pursuant to a separation decree for two years, and impotency. N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966). Also under the new enactment parties to a divorce are free to remarry without restriction. N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1966). This change will probably effect a significant reduction in the number of annulments in New York. *But see* N.Y. DOM. REL. LAW §§ 215-215g (McKinney Supp. 1967) (compulsory counseling in divorce).

5. For example, Missouri, a state not noted for a high annulment rate, granted 91 annulments in 1966. DEPARTMENT OF PUB. HEALTH AND WELFARE OF MO., MISSOURI VITAL STATISTICS 64 (Oct. 1967).

The absence of statutory provision for alimony, child support, and property division may create difficulties whenever the procedure is used, although the problem is more aggravated where annulment is used to circumvent divorce laws and the marital relationship of the parties is, therefore, more likely to have been of greater duration. This note will examine the current statutory and decisional reworking of the common law rule that the only remedy available in an annulment action is a decree dissolving the marriage. In addition, two alternatives for bringing order into this area of the law will be discussed: (1) specific provision for courts to make alimony, child support, and property division orders in annulment actions, or (2) elimination of the availability of annulment to avoid divorce when the latter offers an adequate marital remedy.[6]

I. Alimony

A. *Temporary Alimony*

Temporary alimony is awarded to a wife while the matrimonial litigation is pending; permanent alimony is awarded at the conclusion of the litigation. When the wife requests temporary alimony, she usually will also request counsel and litigation fees.[7] Such temporary awards are designed to afford the wife a temporary source of support pending the action and to enable her to properly prosecute or defend the action.

Absent express statutory provision, courts in a majority of states award temporary alimony and litigation fees when she enters a good faith defense to an annulment action by her husband.[8] As a general rule, if there was

6. The possibility of subsequent modification of annulment decrees will not be discussed; nor will mention be made of such related matters as dower and curtesy or descent and distribution following annulment.

7. 1 B. Armstrong, California Family Law 295-300 (1953).

8. Peacock v. Peacock, 264 Ala. 332, 87 So. 2d 626 (1956); *Ex Parte* McLendon, 239 Ala. 564, 195 So. 733 (1940); Middlecoff v. Middlecoff, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); Eickhoff v. Eickhoff, 29 Colo. 295, 68 P. 237 (1902); DuPont v. DuPont, 46 Del. 592, 87 A.2d 394 (1952); Alexander v. Alexander, 36 App. D.C. 78 (1910); Kienitz v. Kienitz, 38 Hawaii 647 (1950); State v. Superior Ct. of Madison County, 242 Ind. 241, 177 N.E.2d 908 (1961); Webb v. Brooke, 144 Mich. 674, 108 N.W. 358 (1906); Muwinski v. Muwinski, 160 Minn. 477, 200 N.W. 465 (1924); Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150 (1918); Franklin v. Franklin, 365 Mo. 437, 283 S.W.2d 483 (1955); Kruse v. Kruse, 231 Mo. App. 1171, 85 S.W.2d 214 (1935); State *ex. rel.* Wooten v. District Ct., 57 Mont. 517, 189 P. 233 (1920); Timmerman v. Timmerman, 163 Neb. 704, 81 N.W.2d 135 (1957); Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Fowler v. Fowler, 97 N.H. 216, 84 A.2d 836 (1951); Prince v. Freeman, 45 N.M. 143, 112 P.2d 821 (1941); Barbee v. Barbee, 187 N.C. 537, 122 S.E. 177 (1924); Stone v. Stone, 193 Okla. 458, 145 P.2d 212 (1944); Whitebird v. Luckey, 180 Okla. 1, 67 P.2d 775 (1937); Hunt v. Hunt, 23 Okla. 490, 100 P. 541 (1909); Stump v. Stump, 111 Pa. Super. 541, 170 A. 393 (1934); Baker v. Baker, 84

a ceremonial marriage followed by assumption of the marital relationship, no further proof of the marriage's validity is needed to sustain such an award. The courts reason that where the marriage relationship has in fact been assumed, and the wife reasonably establishes its existence, public policy demands provision of alimony.[9] However, if she fails to assert the validity of the marriage, her request will be denied, on the ground that no right to alimony arises in the absence of a valid marriage.[10] If there are children, several courts have awarded temporary alimony for the express purpose of maintaining the children during the pendency of the annulment action.[11] Such holdings ignore the primary basis for granting alimony—the husband's obligation to support his wife as an incident of his marital responsibilities. As a practical matter, however, this misconstruction of alimony's function produces a satisfactory result if the funds are used for the designated purpose of maintaining the children.[12]

Courts in several states deny temporary alimony and litigation fees in annulment actions,[13] reasoning that they have no power to grant such relief in the absence of express statutory authority. A Connecticut statute gives the court discretion to grant permanent alimony in divorce and annulment proceedings.[14] Another provision permits temporary alimony in divorce actions.[15] Connecticut courts have held that the latter section by implication prohibits granting temporary alimony in annulment suits.[16] This reasoning leads to the anomalous result of denying temporary alimony

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Pa. Super. 544 (1925); Leckney v. Leckney, 26 R.I. 441, 59 A. 311 (1904); Scott v. Scott, 9 S.D. 125, 68 N.W. 194 (1896); Portwood v. Portwood, 109 S.W.2d 515 (Tex. Civ. App. 1937); Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944); Bell v. Bell, 122 W. Va. 223, 8 S.E.2d 183 (1940); Meredith v. Shakespeare, 97 W. Va. 514, 125 S.E. 374 (1924).

9. *See* Dietrich v. Dietrich, 41 Cal. 2d 497, 502, 261 P.2d 269, 771-72 (1953).

10. *E.g.*, Peacock v. Peacock, 264 Ala. 332, 87 So. 2d 626 (1956); Middlecoff v. Middlecoff, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909 (1947); Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944).

11. Todd v. Todd, 151 Fla. 134, 9 So. 2d 279 (1942); Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

12. In several states the matter of temporary alimony and litigation fees in annulment proceedings has not been dealt with by statute or decision: Arizona, Georgia, Idaho, Kentucky, Nevada, North Dakota, South Carolina, Tennessee, and Wyoming.

13. Pascale v. Pascale, 5 Conn. Supp. 224 (Super. Ct. 1937); Arndt v. Arndt, 399 Ill. 490, 78 N.E.2d 272 (1948) (by implication); Monteleone v. O'Hanlon, 159 La. 796, 106 So. 308 (1925).

14. CONN. GEN. STAT. REV. § 46-28 (Supp. 1965).

15. CONN. GEN. STAT. REV. § 46-21 (1958).

16. Hall v. Hall, 9 Conn. Supp. 1 (Super. Ct. 1940); Pascale v. Pascale, 5 Conn. Supp. 224 (Super. Ct. 1937).

when there is some doubt as to the validity of the marriage while permitting permanent alimony when the marriage has been ruled invalid.[17]

A number of states have statutes that expressly permit the court to award temporary alimony and litigation fees in annulment proceedings.[18] Conversely, no state has enacted legislation expressly prohibiting the award of temporary allowances pending an annulment. A Virginia statute allowing temporary alimony "at any time pending the suit"[19] has been held applicable to both annulment and divorce actions.[20] Statutes that generally authorize alimony upon annulment, such as that recently enacted in Wisconsin, might also be construed as permitting temporary as well as permanent alimony, although no cases have specifically so held.[21]

17. Illinois has not directly passed on the subject of temporary alimony but divorce cases making mention of the subject indicate a general unwillingness to grant alimony in any form "in the absence of a decree of divorce." *E.g.*, Ollman v. Ollman, 396 Ill. 176, 184, 71 N.E.2d 50, 54 (1947). Therefore, it would appear that in the absence of a valid marriage, the Illinois courts would not be likely to impose an alimony award on the husband. The law in Louisiana, Maine, and Massachusetts is also unsettled concerning alimony awards in annulment actions. The relevant decisions in Louisiana indicate that alimony in any form will be denied in annulment actions. *See* State v. Ponthieaux, 232 La. 121, 94 So. 2d 3 (1957); Monteleone v. O'Hanlon, 159 La. 796, 106 So. 308 (1925). In Maine one case held that alimony could be granted only pursuant to a divorce decree. Although this ruling effectively rules out the award of permanent alimony in an annulment proceeding, it does not clarify the law concerning awards of temporary alimony. Prescott v. Prescott, 59 Me. 146 (1871). As to the status of the Massachusetts law on this subject, *compare* Adams v. Holt, 214 Mass. 77, 100 N.E. 1088 (1913), in which temporary alimony was denied, *with* Levy v. Levy, 309 Mass. 230, 34 N.E.2d 650 (1941), in which the court gave passing acknowledgement to the trial court's discretion to grant temporary alimony in annulment actions.

18. ALASKA STAT. § 9.55.200 (1962); D.C. CODE ANN. § 16-911 (1967) (where wife denies nullity); KAN. GEN. STAT. ANN. § 60-1607 (1964); N.Y. DOM. REL. LAW § 236 (McKinney 1964); OHIO REV. CODE ANN. § 3105.14 (Page Supp. 1966); ORE. REV. STAT. § 107.090 (1965); WASH. REV. CODE ANN. § 26.08.090 (1961). There are a number of decisions from these jurisdictions which either apply the statute or follow the majority non-statutory rule without reference to the statute. *See, e.g.*, Payne v. Payne, 54 App. D.C. 149, 295 F. 970 (1924); Hanford v. Hanford, 214 Iowa 839, 240 N.W. 732 (1932); Ricard v. Ricard, 143 Iowa 182, 121 N.W. 525 (1909); Barnes v. Barnes, 138 N.J. Eq. 504, 48 A.2d 890 (Ct. Err. & App. 1946); Wigder v. Wigder, 14 N.J. Misc. 880, 188 A. 235 (Ch. 1936); Butler v. Butler, 204 App. Div. 602, 198 N.Y.S. 391 (1923); Lukaiser v. Lukaiser, 89 N.Y.S.2d 671 (Sup. Ct. 1949); Bauman v. Clark, 203 Ore. 193, 279 P.2d 478 (1955); Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010 (1956); Arey v. Arey, 22 Wash. 261, 60 P. 724 (1900).

19. VA. CODE ANN. § 20.103 (1950).

20. Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948). Although the temporary alimony statute has been reenacted since the *Henderson* decision, the case is still good law, because the nature of the statute's coverage and its general wording have not been altered significantly.

21. WIS. STAT. ANN. § 247.245 (Supp. 1967). The presently existing statute in Wisconsin dealing with temporary orders permits them in "every action affecting marriage." WIS. STAT. ANN. § 247.23 (Supp. 1967).

The most appropriate immediate solution to the various problems posed by temporary alimony is a statute authorizing temporary allowances in annulment actions whenever the woman has in good faith assumed the position of wife. The wife has a right to such allowances, and the theoretical existence of a valid marriage should not affect this right. Nor should the wife's position as plaintiff or defendant be controlling. Furthermore, litigation costs should be expressly authorized for a woman who would not otherwise be able properly to present her case. Although such results have frequently been reached in the absence of express statutory authorization, codification of specific guidelines would increase the likelihood of just and consistent administration.

B. *Permanent Alimony*

The theoretical basis upon which permanent alimony is awarded in divorce proceedings is far from clear. While it appears to be generally based on a continuation of the husband's duty to support his wife,[22] the influence of the comparative fault of the parties for the breakdown of the marriage is clear in the statutes, judicial opinions and the day-to-day administration of the award.[23] Moreover, there is some evidence that trial judges prefer to make a clean break between the parties and will award alimony only when "equitable" results cannot be achieved by a single lump sum settlement and property division.[24] One commentator has concluded that of all support problems, it is in regard to alimony that "a new approach to the rights and duties of the husband and wife is most needed."[25] Nevertheless, it seems likely that in a significant number of situations where the legal relationship of husband and wife is terminated, alimony may serve a valid function in adjusting the legal and economic relationships between the parties.[26]

22. *See, e.g., In re* Spencer, 83 Cal. 460, 23 P. 395 (1890); Commonwealth *ex rel.* Brandt v. Brandt, 8 Lebanon 90, *aff'd*, 195 Pa. Super. 48, 169 A.2d 327 (1962).

23. *In re* Spencer, 83 Cal. 460, 23 P. 395 (1890); Daggett, *Division of Property Upon the Dissolution of Marriage*, in SELECTED ESSAYS ON FAMILY LAW 1053, 1056 (American Assoc. of Law Schools ed. 1950).

24. Hopson, *The Economics of Divorce: A Pilot Empirical Study at the Trial Court Level*, 11 KAN. L. REV. 107, 125-26 (1962).

25. Note, *A Consideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857, 865 (1943).

26. The theory of *quantum meruit* has been applied on occasion to determine the extent of an alimony award and as a vehicle for granting monetary awards in lieu of property settlement. Middlecoff v. Middlecoff, 160 Cal. 2d 22, 324 P.2d 669 (1958); Overton v. Brown, 3 La. App. 591 (1926); Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951); Walker v. Walker, 54 Ohio L. Abs. 153, 84 N.E.2d 258 (C.P. Lake County 1948). Under this doctrine the wife is entitled to recover compensation for

In the absence of an express statutory provision, most courts have not allowed permanent alimony following an annulment.[27] The courts reason that since an annulment decree finds that no valid marriage ever existed, the alleged husband owes no duty of maintenance or support to his apparent wife.[28]

Several states have enacted statutes expressly giving courts discretion to award permanent alimony in annulment suits when such an allowance would be just and equitable.[29] A Connecticut statute, for example, allows

services rendered during the marital relationship when her actions have been in good faith. Sanquinetti v. Sanquinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937); Barber v. Barber, 74 Iowa 301 (1887). Massachusetts, however, has denied a wife compensation in an annulment proceeding for services rendered. The court reasoned that a money award is similar to alimony and absent statutory authority the court has no discretion to make such an award. Adams v. Holt, 214 Mass. 77, 100 N.E. 1088 (1913). *See also* Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946).

27. *See, e.g.*, Peacock v. Peacock, 264 Ala. 332, 87 So. 2d 626 (1956); Goggans v. Osborn, 16 Alas. 451, 237 F.2d 186 (9th Cir. 1956) (by implication in a contempt action); Sanquinetti v. Sanquinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937); Middlecoff v. Middlecoff, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); DuPont v. DuPont, 46 Del. 592, 87 A.2d 394 (1952); Payne v. Payne, 54 App. D.C. 149, 295 F. 970 (1924); Alexander v. Alexander, 36 App. D.C. 78 (1910); Kienitz v. Kienitz, 38 Hawaii 647 (1950); Morgan v. Morgan, 148 Ga. 625, 97 S.E. 675 (1918); Schlamberg v. Schlamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898); Rose v. Rose, 274 Ky. 208, 118 S.W.2d 529 (1938); Monteleone v. O'Hanlon, 159 La. 796, 106 So. 308 (1925); Chase v. Chase, 55 Me. 21 (1867); Yake v. Yake, 170 Md. 75, 183 A. 555 (1936); Adams v. Holt, 214 Mass. 77, 100 N.E. 1088 (1913); Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150 (1918); Kruse v. Kruse, 231 Mo. App. 1171, 85 S.W.2d 214 (1935); McMurray v. McMurray, 58 Mont. 229, 190 P. 924 (1920); Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Widger v. Widger, 14 N.J. Misc. 880, 188 A. 235 (App. Div. 1936); Prince v. Freeman, 45 N.M. 143, 112, P.2d 821 (1941); Short v. Short, 61 Ohio L. Abs. 49, 102 N.E.2d 719 (Ct. App. 1951); Whitebird v. Luckey, 180 Okla. 1, 67 P.2d 775 (1937); Chapman v. Parsons, 66 W. Va. 307, 66 S.E. 461 (1909) (by implication in an action for alimony pendente lite); Becker v. Becker, 153 Wis. 226, 140 N.W. 1082 (1913); *cf., e.g.*, Ollman v. Ollman, 396 Ill. 176, 71 N.E.2d 50 (1947) (by implication in a divorce case); Strater v. Strater, 159 Me. 508, 196 A.2d 94 (1963) (by implication in a divorce case); State *ex rel.* Wooten v. District Ct., 57 Mont., 517, 189 P. 233 (1920) (by implication in an application for alimony pendente lite); Abelt v. Zeman, 16 Ohio Op. 2d 87, 173 N.E.2d 907 (C.P. Wayne County 1961). *But see* Bray v. Landergren, 161 Va. 699, 172 S.E. 252 (1934), finding a continuing obligation to support but rejecting the specific division of property inherent in the theory of *quantum meruit*. *See also* Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010 (1956), in accord with the statement in the text, but finding statutory authorization to make the award.

28. *See* text accompanying notes 1-3 *supra*.

29. ALASKA STAT. § 9.55.210 (1962) (divorce and actions declaring a marriage void); CONN. GEN. STAT. REV. § 46-28 (Supp. 1965); IOWA CODE ANN. § 598.24 (1946) (when wife acted in good faith); N.H. REV. STAT. ANN. § 458:19 (1955); N.Y. DOM. REL. LAW § 236 (McKinney 1964); ORE. REV. STAT. § 107.100 (1965); WASH. REV. CODE ANN. § 26.08.110 (1961); WIS. STAT. ANN. § 247.245 (Supp. 1967) (in special circumstances).

the court to make such orders concerning permanent alimony "as it might make in a proceeding for a divorce between such parties if married."[30] Similarly, a Virginia statute allows permanent alimony on "dissolution of a marriage, and also upon . . . divorce."[31] The wording of this last statute indicates that "dissolution of marriage" refers not only to divorce, but includes annulment.

Statutes in three states authorize permanent alimony incident to an annulment only in limited situations. In Iowa, either party can receive permanent alimony only if he entered into the marriage in good faith.[32] The Hawaiian courts are given discretion to grant the wife and children a support allowance when the husband in bad faith induced the marriage.[33] Although the statute describes this award as a "allowance for the support," it serves the same purpose as an alimony decree. The innocent spouse in Wisconsin may receive permanent alimony in three situations: when the husband fails to reveal that he is not divorced from his former wife; when he fails to wait the one-year statutory period following divorce; or when he fails to obtain the necessary permission of the court to remarry.[34]

Permanent alimony statutes of a few states, not limited by their express terms to divorce proceedings, arguably apply to annulment proceedings. In Tennessee[35] and New Mexico[36] an award of permanent alimony may be made upon "dissolution of marriage." A Virginia case construed the language "dissolution of marriage" as including annulments as well as divorce.[37] New Mexico rejected the Virginia construction and has followed the common law by denying permanent alimony in annulment.[38] While there are no cases in Tennessee allowing permanent alimony, neither are there any specifically negating the authority to make such an award.[39]

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30. CONN. GEN. STAT. REV. § 46-28 (Supp. 1965).

31. VA. CODE ANN. § 20-107 (Supp. 1966).

32. IOWA CODE ANN. § 598.24 (1946).

33. HAWAII REV. LAWS § 324-4 (1955). Such allowance cannot exceed one-third of the husband's estate.

34. WIS. STAT. ANN. § 247.245 (Supp. 1967).

35. TENN. CODE ANN. § 36-820 (1955). This section permits the allowance of alimony when a marriage is "dissolved absolutely," but there are no cases interpreting its application to annulments.

36. N.M. STAT. ANN. § 22-7-6 (1953). Allowance of permanent alimony is sanctioned in "any suit for dissolution of the bonds of matrimony."

37. *See* notes 19-20 *supra* and accompanying text.

38. Prince v. Freeman, 45 N.M. 143, 112 P.2d 821 (1941).

39. *See* Fessenden, *supra* note 2, at 112. Although the Kansas statute dealing with permanent alimony does not expressly include annulments, it is arguable that it confers the power to make such awards in annulment actions. KAN. GEN. STAT. ANN. § 60-1610 (1964). In New Jersey, a statutory provision has been construed to permit the award of *temporary* alimony in annulment actions, N.J. STAT. ANN. § 2A:34-23 (1952), but it is

Only Ohio prohibits by statute the award of permanent alimony in annulment actions.[40] Such legislation in effect codifies the common law rule and avoids any ambiguity in the meaning of related code provisions dealing with termination of marriage.[41]

In drafting an alimony statute, it must be recognized that the theoretical basis for alimony is confused. The solution most often used by the courts in dealing with alimony awards in annulment proceedings consists of exercising the statutory authority to award alimony that is applicable to divorce. Although this approach is preferable to denying courts any authority to award alimony in annulment proceedings, it probably transfers to annulment the problems of existing divorce-alimony administration. The expansion of authority to award alimony in annulment proceedings provides an opportunity to reconsider the part which alimony should play in the administration of marital dissolution. Some commentators have suggested basing the award solely upon the need of the more economically deficient spouse,[42] but where the marriage has been of short duration it is difficult to justify imposing upon the husband the burden of supporting even an obviously needy ex-wife. A more satisfactory approach would direct that alimony be used to require one spouse to support the other when, by reason of living together as man and wife, the wife's ability to maintain herself has been reduced, as when she is unlikely to remarry because the duration of the marital relationship has taken her past her period of "prime eligibility." Fault, under such a formulation, would no longer be considered, and the general criteria would be appropriately applied whether the marital relationship was terminated by divorce or annulment.[43]

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unlikely that this provision also encompasses permanent alimony. Dicta in a recent case dealing with a related matter indicates that there is no right to alimony in the case of a void mariage. Minder v. Minder, 83 N.J. Super. 159, 199 A.2d 69 (Ch. 1964); *see* Barnes v. Barnes, 138 N.J. Eq. 504, 48 A.2d 890 (1946). In Kansas cases decided prior to the present statute's enactment denied permanent alimony in annulment proceedings. Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898); Fuller v. Fuller, 33 Kan. 582, 7 P. 241 (1885). However, these cases are dated, and the current statute indicates a different result.

40. OHIO REV. CODE ANN. § 3105.17 (Page 1960).

41. *See* KAN. GEN. STAT. ANN. § 60-1610 (1964); VT. STAT. ANN. tit. 15, § 754 (1959); VA. CODE ANN. § 20.107 (Supp. 1966).

42. *See* S. HOFSTADTER & S. LEVITTAN, ALIMONY—A REFORMULATION OF FAMILY LAW 51 (1967).

43. It seems likely that in most annulment situations, where the marriage will have been of short duration, no damage to either party's ability to provide support will have occurred. But it is possible to hypothesize situations where alimony would, under such circumstances, be proper—as where the woman has become pregnant, thus, drastically affecting her ability to pursue a full-time career.

II. Division of Property

Authority of courts to transfer separately-owned property of either spouse to the other upon decree of divorce is purely statutory; in the absence of express statutory authorization there exists no power to deal with the property rights of the spouses.[44] Generally, however, the courts may divide community or jointly acquired property in kind, and will do so whenever possible.[45] In the alternative, a court may enter a money judgment in lieu of property division[46] or may set aside all of the property to one party and require such party to pay a specified amount of money to the other spouse.[47]

Although annulment usually terminates marriages shortly after the ceremony, consideration must occasionally be given to distribution of property.[48] In theory an annulment decree places the parties in the same position as if the marriage never existed. While a few courts, applying this logic, have refused to divide property accumulated during the marriage,[49] leaving the parties to determine for themselves how the property will be divided, a majority of courts will effect some equitable distribution.[50]

44. *E.g.*, Adair v. Adair, 258 Ala. 293, 303, 62 So. 2d 437, 446 (1952); Menor v. Menor, 154 Colo. 475, 391 P.2d 473 (1964); Kulok v. Kulok, 40 Misc. 2d 999, 244 N.Y.S.2d 521 (Dist. Ct. 1963).

45. *E.g.*, Wood v. Wood, 263 Ala. 384, 82 So. 2d 556 (1955); Snyder v. Snyder, 205 N.E.2d 159 (Ind. App. 1965); Hearns v. Hearns, 333 Mich. 423, 53 N.W.2d 315 (1952).

46. Lain v. Lain, 134 Ind. App. 557, 189 N.E.2d 838 (1963); Esseltyn v. Casteel, 205 Ore. 344, 288 P.2d 215 (1955).

47. Dallman v. Dallman, 164 Cal. App. 2d 815, 331 P.2d 245 (1958); Poage v. Poage, 59 N.M. 17, 278 P.2d 132 (1954); Esseltyn v. Casteel, 205 Ore. 344, 288 P.2d 215 (1955).

48. *See* Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582 (9th Cir. 1928); Whitebird v. Luckey, 180 Okla. 1, 67 P.2d 775 (1937).

49. The cases holding that a wife is not entitled to a share in property accumulated during the supposed marriage are both rare and dated. One Georgia case has held that following the annulment of a marriage entered in good faith, the wife acquired no rights in the joint accumulation of the parties while they lived together. Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900). Although the justification for this ruling is doubtful, the ruling has never been overturned either by case or statute. *Accord*, Bruno v. Bruno, 221 Ark. 759, 256 S.W.2d 341 (1953); Cooper v. McCoy, 116 Ark. 501, 173 S.W. 412 (1915). *But see* Vance v. Hinch, 222 Ark. 494, 261 S.W.2d 412 (1953); Note, *The Effect of Void and Voidable Marriages in Arkansas*, 10 Ark. L. Rev. 188 (1956).

50. Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582 (9th Cir. 1928); Middlecoff v. Middlecoff, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); Arthur v. Arthur, 152 Cal. App. 2d 87, 312 P.2d 762 (1957) (household furniture and equipment); Rickards v. Rickards, 53 Del. 134, 166 A.2d 425 (1960); Schlamberg v. Schlamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Reese v. Reese, 132 Kan. 438, 295 P. 690 (1931); Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898); Fuller v. Fuller, 33 Kan. 582, 7 P. 241 (1885); Prieto v. Succession of Prieto, 165 La. 710, 115 So. 911 (1928); Overton v. Brown, 3 La. App. 591 (1926) (community property); Donnelly v. Donnelly, 84

Some courts treat the property as held in joint tenancy or in tenancy in common, and order an equal division.[51] This method is based on the theory that there has been an unsuccessful attempt to create a tenancy by the entirety. While this system is preferable to the common law refusal to distribute property, it can result in obvious unfairness. A party may purchase a large amount of property solely with his own money following the marriage ceremony, only to find the property will be divided equally upon annulment, without regard to the original investment. Since there is no definite standard governing when the joint tenancy-tenancy in common device should be applied, there is no concrete protection against an inequitable determination.

At least two community property states, Louisiana and California, have permitted the wife to acquire an interest in the community property by application of the putative spouse doctrine. This doctrine asserts that a woman who lives with a man as his wife in the good faith belief that a valid marriage exists is entitled upon termination of their relationship to share in the property acquired by them during its existence.[52] California has held that upon dissolution of a "putative marriage the property . . . is to be treated as though it was the accumulation of a valid marriage."[53]

A.2d 89 (Md. Ct. App. 1951) (tenancy in common): Walker v. Walker, 330 Mich. 332, 47 N.W.2d 633 (1951); Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951); Lawrence v. Heavner, 232 N.C. 557, 61 S.E.2d 697 (1950) (tenancy in common); Walker v. Walker, 54 Ohio L. Abs. 153, 84 N.E.2d 258 (C.P. Lake County 1948); Whitebird v. Luckey, 180 Okla. 1, 67 P.2d 775 (1937); Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Juliano v. Juliano, 24 Pa. D. & C. 585 (C.P. Phila. County 1935) (tenancy in common); Beuck v. Howe, 71 S.D. 288, 23 N.W.2d 744 (1946); Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948) (not community property); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908); Philips v. Philips, 106 W. Va. 105, 144 S.E. 875 (1928); Siskoy v. Siskoy, 250 Wis. 435, 27 N.W.2d 488 (1947).

In several states the matter of property division in annulment proceedings has not been considered by the courts or legislatures. The states are Alabama, Arizona, Connecticut, Florida, Maine, Montana, Nevada, New Mexico, North Dakota, South Carolina, Tennessee, Texas, and Wyoming.

51. Donnelly v. Donnelly, 84 A.2d 89 (Md. Ct. App. 1951); Lawrence v. Heaver, 232 N.C. 557, 61 S.E.2d 697 (1950); Juliano v. Juliano, 24 Pa. D. & C. 585 (C.P. Phila. County 1935). *But see* Rickards v. Rickards, 53 Del. 134, 166 A.2d 425 (1960).

52. Union Bank & Trust Co. v. Gordon, 116 Cal. App. 2d 681, 689, 254 P.2d 644, 649 (1953) (dissolution by death); Overton v. Brown, 3 La. App. 591 (1926); Rochelle v. Hezeau, 15 La. Ann. 306 (1860).

53. Union Bank & Trust Co. v. Gordon, 116 Cal. App. 2d 681, 689, 254 P.2d 644, 649 (1953) (dissolution by death). In several states the theory of *quantum meruit* has been applied in order to make a monetary award in lieu of property division. The *quantum meruit* device is used to avoid unfairness in annulment proceedings and is in effect used as substitute for unavailable alimony as well as for division of property. *See* note 26 *supra*.

A substantial number of states do have statutes authorizing property division in annulment actions. Several provide for division of property in conjunction with the granting of alimony.[54] A Washington statute permits the court to make a disposition of the property that is equitable, to provide for the custody and support of children, and to grant alimony to the wife.[55]

Three jurisdictions distinguish between real and personal property. In Michigan the wife receives that portion of the real property to which she would be entitled if her husband died intestate,[56] while the whole or such part of the personal property is awarded as the court "shall deem just and reasonable."[57] Minnesota allows the wife immediate possession of all her real estate[58] and restoration of what is just and reasonable from her husband's personal estate.[59] Nebraska distributes real property on the same basis as Michigan,[60] and grants the wife all the personal property or such reasonable part as the husband received by means of the apparent marriage.[61]

Although courts achieve generally satisfactory results in dividing property upon annulment, a statute expressly granting discretion to distribute both jointly acquired and separate property would promote consistency and fairness. The statute should include definite guide-lines adopting the best of the considerations employed in divorce cases. For example, the length of the marriage is significant to any property division. If the marriage lasted a number of years, more should go to the dependent spouse than would be the case when the marriage is of short duration. Who paid for the property in question is also relevant. If an item was obtained solely through the individual resources of one spouse, there is strong justification for awarding the property to that party. Another relevant factor is the type of property involved. The wife and children are more likely to need the

54. N.H. REV. STAT. ANN. § 458:19 (1955); ORE. REV. STAT. § 107.100 (1965); VA. CODE ANN. § 20.107 (Supp. 1966); WASH. REV. CODE ANN. § 26.08.110 (1961). It is notable that New Hampshire is the only state that expressly allows the putative husband to recover any allowance in an annulment based on the wife's misfeasance. The husband is allowed such part of the wife's estate as "justice may require." *See* N.H. REV. STAT. ANN. § 458:22 (1955).

55. WASH. REV. CODE ANN. § 26.08.110 (1961).

56. MICH. STAT. ANN. § 25.98 (1957).

57. MICH. STAT. ANN. § 25.99 (1957.)

58. MINN. STAT. ANN. § 518.58 (Supp. 1967).

59. MINN. STAT. ANN. § 518.59 (Supp. 1967).

60. NEB. REV. STAT. § 42-313 (1960).

61. NEB. REV. STAT. § 42-314 (1960). The District of Columbia specifically provides for determination of property rights by the court in both divorce and annulment. D.C. CODE ANN. § 16-910 (1966). *See also* IDAHO CODE ANN. § 32-712 (Supp. 1967) (allows property division following dissolution of marriage).

security of retaining the family home and personal effects such as furniture and clothing. In contrast, the court should consider awarding any family business to the husband, particularly if he will need a source of income to make support payments. Finally, the relative financial position of the parties must be considered: the award should not be so low as to make the wife become a ward of the state; nor should the distribution be so favorable to the wife as to prevent the husband from meeting other obligations imposed by the court (*i.e.*, alimony and child support). Through careful application of these criteria, the court's decision should be both just and reasonable for all concerned.

III. Legitimacy, Custody and Child Support

At common law the children of an annulled marriage were considered illegitimate.[62] To avoid this harsh result, a large number of states have passed statutes making children of an annulled marriage legitimate.[63] Others have distinguished between marriages that are void *ab initio*, and those merely voidable by court decree,[64] holding the offspring of the latter only to be legitimate.[65]

62. At common law an illegitimate child was not entitled to inherit from his parents, and the parents were free of any obligation to support the child. Reader, *The Annulment of Marriage in Pennsylvania*, 41 Dick L. Rev. 37 (1936).

63 Cal. Civ. Code § 84 (Deering 1960); Colo. Rev. Stat. Ann. § 46-3-5 (1963); Conn. Gen. Stat. Rev. § 46-28 (Supp. 1965); Del. Code Ann. tit. 13, § 105 (1953); Hawaii Rev. Laws § 324-5 (1955); Idaho Code Ann. § 32-503 (1963) (unless defrauded as to wife's pregnancy); Kan. Gen. Stat. Ann. § 23-124 (1964); Ky. Rev. Stat. Ann. § 391.100 (1963); Md. Ann. Code art. 16, § 27 (1966); Mo. Rev. Stat. § 474.080 (1959); Mont. Rev. Codes Ann. § 48-207 (Supp. 1967); Nev. Rev. Stat. § 125-410 (1967); N. H. Rev. Stat. Ann. § 458:23 (1955) (unless court decrees otherwise); N.M. Stat. Ann. § 57-1-9 (1953); N.Y. Dom. Rel. Law § 175 (McKinney 1964); N.C. Gen. Stat. § 50-11.1 (1966); N.D. Cent. Code Ann. § 14-04-03 (1960); Ohio Rev. Code Ann. § 3105.33 (Page Supp. 1966); Okla. Stat. Ann. tit. 84, § 215 (1951); Pa. Stat. Ann. tit. 48, § 169.1 (1965); S.D. Code § 14.031 (1939); Tenn. Code Ann. § 36-832 (1955); Vt. Stat. Ann. tit. 15, § 520 (1959); Va. Code Ann. § 64.7 (1949); Wash. Rev. Code Ann. § 26.08.060 (1961).

64. At common law the rights of the parties to an annullable marriage were dependent upon whether the marriage was absolutely void when entered into or merely voidable through court decree. In theory, a void marriage was always void and there need be no judicial cognizance of the fact. In order to invalidate a voidable marriage, however, direct judicial attack by the innocent party was required. While a void marriage could never become valid, a voidable marriage could be given effect by ratification. Although certain vestiges of this distinction still exist, as indicated in the text, dissolution of marriage by annulment is now generally conceded to require some degree of judicial formality. *See* R. Mackay, Law of Marriage and Divorce Simplified 7-8 (3d ed. 1959); Fessenden, *Nullity of Marriage*, 13 Harv. L. Rev. 110, 112-13 (1899); Reader, *supra* note 62.

Georgia and North Carolina have statutes that prohibit annulment when children are born or will be born of the apparent marriage. Ga. Code Ann. § 53-601 (1933);

A large majority of states now have statutes that give the courts express authority to make orders concerning child custody and support following an annulment.[66] However, in the absence of statutory authorization, a number of courts have assumed the right to grant custody and support decrees on the basis of their inherent equity powers.[67] Courts in several states have

N.C. GEN. STAT. § 51-3 (1966); *see* Wallace v. Wallace, 221 Ga. 510, 145 S.E.2d 546 (1965); Scarboro v. Morgan, 233 N.C. 449, 64 S.E.2d 422 (1951). In New Jersey a similar statute has been held to grant the courts discretion to deny annulment if it would be adverse to the child's best interests. N.J. STAT. ANN. § 2A:34-1 (1952); Caruso v. Caruso, 104 N.J. Eq. 588, 146 A. 649 (1929). These statutes protect the children from illegitimacy and its related disabilities. However, the void-voidable distinction is again present since these states have by statute rendered children of *void* marriages legitimate with the corresponding implication that a support obligation arises in such cases. GA. CODE ANN. § 53-104 (1933); N.J. STAT. ANN. § 2A:34-20 (1952). This indicates a recognition of the common law rule that void marriages do not require a judicial decree in order to be terminated. *See* Note, 17 IOWA L. REV. 254 (1932).

65. D.C. CODE ANN. §§ 16-907 to -908 (1966) (legitimate in case of bigamy, idiocy, and insanity); IOWA CODE ANN. §§ 598.22-.23 (1946) (illegitimate in case of consanguinity or husband's impotence); KY. REV. STAT. ANN. § 391-100 (1963) (illegitimate in cases of miscegenation or incest); ME. REV. STAT. ANN. tit. 19, §§ 633-34 (1964) (illegitimate only in case of consanguinity); MASS. ANN. LAWS ch. 207, §§ 15-17 (1955) (illegitimate only in case of consanguinity); MICH. STAT. ANN. §§ 25.6, 25.108-.109 (1957) (illegitimate only in case of bigamy); MISS. CODE ANN. § 2748-03 (Supp. 1966) (illegitimate in case of consanguinity or miscegenation); NEB. REV. STAT. §§ 42-326 to -328 (1960) (illegitimate in case of miscegenation or consanguinity); WYO. STAT. ANN. §§ 20-68 to -70 (1957) (illegitimate in case of consanguinity). Statutes making children of a bigamous marriage legitimate generally contain a good faith requirement. Rendering the child illegitimate when the parties to a bigamous marriage both act in bad faith seems a somewhat unfair result inasmuch as the innocent child is the only one to directly suffer from such a rule.

A number of other states have statutes which provide only a partial solution to the problem of legitimacy. FLA. STAT. ANN. § 61.051 (Supp. 1968) (children of bigamous marriage are illegitimate); GA. CODE ANN. § 53-104 (1933) (children of a void marriage legitimate); R.I. GEN. LAWS ANN. § 15-1-6 (1956) (court has power to declare legitimacy); S.C. CODE ANN. § 20-6.1 (1962) (legitimate in case of good faith bigamous marriage); UTAH CODE ANN. § 30-1-3 (1953) (legitimate in case of good faith bigamous marriage).

66. ALASKA STAT. § 9.55.210 (1962); CAL. CIV. CODE § 84 (Deering 1960); COLO. REV. STAT. ANN. § 46-3-6 (1963); CONN. GEN. STAT. REV. § 46-28 (Supp. 1965); DEL. CODE ANN. tit. 13, § 1510 (1953); HAWAII REV. LAWS § 324-31 (1955); IDAHO CODE ANN. § 32-504 (1963); ME. REV. STAT. ANN. tit. 19, § 752 (1964); MASS. ANN. LAWS ch. 207, § 18 (1955); MICH. STAT. ANN. § 25.96 (1957); MINN. STAT. ANN. § 518.17 (1947); MISS. CODE ANN. § 2748-04 (Supp. 1966); MONT. REV. CODES ANN. § 48-207 (Supp. 1967); NEB. REV. STAT. § 42-311 (1960); N.H. REV. STAT. ANN. § 458:17 (1955); N.Y. DOM. REL. LAW § 240 (McKinney 1964); N.D. CENT. CODE ANN. § 14-04-04 (1960); OHIO REV. CODE ANN. § 3105.33 (Page Supp. 1966); OKLA. STAT. ANN. tit. 12, § 1277 (1961); ORE. REV. STAT. § 107.100 (1965); S.D. CODE § 14.0604 (1939); TENN. CODE ANN. § 36-828 (1955); VA. CODE ANN. § 20.107 (Supp. 1966); WASH. REV. CODE ANN. § 26.08.110 (1961); W. VA. CODE ANN. § 48-2-15 (1966); WIS. STAT. ANN. § 247.24 (1957); WYO. STAT. ANN. § 20-61 (1957).

67. *See, e.g.*, Rowe v. Rowe, 96 F. Supp. 334 (D.D.C. 1951); Kibler v. Kibler,

assumed the power to make such awards by reference to statutory provisions not directly covering annulments. In California, a general statute providing for custody and maintenance of children has been held applicable to annulments although it contains no specific reference.[68] California decisions indicate that even if the power to make custody and support orders following an annulment cannot be inferred from the statute, the right to make such orders is inherent in any court having jurisdiction over annulments.[69] The Utah Supreme Court has held that the statute which makes children of a void marriage legitimate, also, by implication, confers jurisdiction on the court to make custody and support orders.[70]

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180 Ark. 1152, 24 S.W.2d 867 (1930); Todd v. Todd, 151 Fla. 134, 9 So. 2d 279 (1942); Wallace v. Wallace, 221 Ga. 510, 145 S.E.2d 546 (1965); Cardenas v. Cardenas, 12 Ill. App. 2d 497, 140 N.E.2d 377 (1956); Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909 (1947) (implicit in legitimation statute); Clayton v. Clayton, 231 Md. 74, 188 A.2d 550 (1962); Carroll v. DeMartini, 19 N.J. Super. 136, 88 A.2d 26 (1952); Sanders v. Sanders, 232 S.C. 625, 103 S.E.2d 281 (1958); Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965); Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944). There are also a number of cases dealing with this matter to be found in the statutory jurisdictions already enumerated. *See* Munson v. Munson, 27 Cal. 2d 659, 166 P.2d 268 (1946); Figoni v. Figoni, 211 Cal. 354, 295 P. 339 (1931); Arthur v. Authur, 152 Cal. App. 2d 87, 312 P.2d 762 (1957); Williams v. Williams, 102 Cal. App. 2d 206, 227 P.2d 43 (1951); Perlstein v. Perlstein, 152 Conn. 152, 204 A.2d 909 (1964); Bass v. Ervin, 177 Miss. 46, 170 So. 673 (1936); Paltani v. Creel, 169 Neb. 591, 100 N.W.2d 736 (1960); Harder v. Harder, 162 Neb. 433, 76 N.W.2d 260 (1956); Bickford v. Bickford, 74 N.H. 448, 69 A. 579 (1908); Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Radeff v. Radeff, 272 App. Div. 582, 74 N.Y.S.2d 749 (1947); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (1943); Abelt v. Zeman, 16 Ohio Op. 2d 87, 173 N.E.2d 907 (C.P. Cuyahoga County 1961); Greenwood v. Greenwood, 387 P.2d 615 (Okla. 1963); Stone v. Stone, 193 Okla. 458, 145 P.2d 212 (1944); Hunt v. Hunt, 23 Okla. 490, 100 P. 541 (1909); State *ex rel.* Weingart v. Kiessenbeck, 167 Ore. 25, 114 P.2d 147 (1941); Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948); Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010 (1956); Barker v. Barker, 31 Wash. 2d 506, 197 P.2d 439 (1948); Siskoy v. Siskoy, 250 Wis. 435, 27 N.W.2d 488 (1947); Watts v. Owens, 62 Wis. 512, 22 N.W. 720 (1885).

68. CAL. CIV. CODE § 84 (Deering 1960); *see* Swycaffer v. Swycaffer, 44 Cal. 2d 689, 285 P.2d 1 (1955); Williams v. Williams, 102 Cal. App. 2d 206, 227 P.2d 43 (1951).

69. *See, e.g.*, Munson v. Munson, 27 Cal. 2d 659, 166 P.2d 268 (1946); Arthur v. Arthur, 152 Cal. App. 2d 87, 312 P.2d 762 (1957).

70. Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944). In Kansas, a statute provides that a decree for child custody and support may be made "in an action under this article." KAN. GEN. STAT. ANN. § 60-610 (1964). Since the "article" covers both annulment and divorce, the law would seem to be clear, despite an absence of cases applying the provision in annulment actions. Although there is no specific statute allowing for custody and support of children following an annulment in Vermont, one section of the code provides that custody and maintenance of children of a marriage annulled on the ground of fraud go to the innocent party. VT. STAT. ANN. tit. 15, § 517 (1959).

States that do not specifically protect children of an invalid marriage generally provide by statute that parents of illegitimate children are bound to support and maintain them.[71] Even in the absence of a statute, it is generally accepted that the father of an illegitimate child owes him a duty of support.[72] In some states this obligation has been held to be implicit in the relevant statutory provision.[73] In Texas, for example, there is no common law duty for a father to maintain his illegitimate children. However, a Texas court has held that it is implicit in a statute which legitimatizes children of certain void marriages, that the court may award custody and impose a duty of support on the parents.[74]

It is clear that there is no longer, if indeed there ever was, any justification for imposing the burden of illegitimacy on children of annulled marriages. Statutory provision should be made for the legitimacy of all such children. Further, the court should have authority to determine custody and order support in the same manner as a divorce proceeding.

CONCLUSION

In most jurisdictions where legislative or judicial attention has been given to the authority of the annulment court to deal with the rights of the parties, the result has been an improvisation of authority molded on existing divorce procedures. An approach that has received more limited acceptance is the elimination of annulment as a procedure for termination of marriage. In Rhode Island divorce may be granted for either a void or voidable marriage,[75] while in Maryland divorce may be granted for marriages deemed void.[76] A number of other states have made certain common law grounds for annulment grounds for divorce as well.[77] For ex-

71. *See, e.g.*, CAL. CIV. CODE § 196a, 200 (Deering Supp. 1967); MASS. ANN. LAWS ch. 273, §§ 14-15 (1956); MINN. STAT. ANN. § 257.23 (1959); N.C. GEN. STAT. § 49-2 (1966).

72. *See, e.g.*, Todd v. Todd, 151 Fla. 134, 9 So. 2d 279 (1942); Blades v. Szatai, 151 Md. 644, 135 A. 841 (1927); Sanders v. Sanders, 232 S.C. 625, 103 S.E.2d 281 (1958). *But see* State v. Barilleau, 128 La. 1033, 55 So. 664 (1911); Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965).

73. Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909 (1947); Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912); Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965); *see* State v. Ponthieaux, 232 La. 121, 94 So.2d 3 (1957).

74. Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965).

75. R.I. GEN. LAWS ANN. § 15-5-1 (1956).

76. MD. ANN. CODE art. 16, §§ 24-25 (1966).

77. ARK. STAT. ANN. § 34-1202 (Supp. 1967) (impotence and bigamy); FLA. STAT. ANN. § 61.041 (Supp. 1968) (impotence, consanguinity, and bigamy); ILL. ANN. STAT. ch. 40, § 1 (Smith-Hurd Supp. 1967) (impotence and bigamy); MISS. CODE ANN. § 2735 (1956) (impotence, insanity, consanguinity, and bigamy); MO. REV. STAT. § 452.010 (1959) (impotence and bigamy); OHIO REV. CODE ANN. § 3105.01 (Page 1960) (im-

ample, Tennessee includes bigamy and impotence as grounds for divorce.[78] Mississippi allows divorce for bigamy, insanity, impotence, and consanguinity in addition to several other grounds.[79]

The Rhode Island-Maryland approach to the problems of alimony, property division, legitimacy, and custody and support of children greatly simplifies matters by permitting divorce for any reason which renders the marriage a nullity. To a limited extent this approach eliminates the problems of vagueness and omission which hamper present annulment legislation. At the same time the court retains the power to treat annulment actions differently from divorce actions when such differentiation is considered necessary or desirable. The Rhode Island-Maryland approach, however, sacrifices the advantages of annulment as a separate marital remedy.

Annulment does serve a valid function as a separate procedure for terminating the marital relationship. The social stigma attached to divorce may constitute a significant burden to some. Those who dissolve a short but unpleasant relationship may feel significantly better if the legal procedure used reinforces their denial that any significant bond ever existed with the ex-partner. Moreover, although a civil annulment may not satisfy Catholic canon law,[80] it may be preferable to some Catholics, because it is theoretically more consistent with the religious remedy than is divorce. But if annulment is to have a valid place in modern marriage law, its availability must be limited to situations where it can be said that the parties have not entered into a complete marriage relationship. Therefore, annulments should be available only when (1) the basis for terminating the marriage can realistically be said to have prevented the formulation of a valid legal relationship[81] and (2) there has been no actual assumption of the marital status.[82] If so restricted, annulment would serve a clearly defined function and would be distinct from divorce as a means of terminating the legal relationship created by a defective marriage. In most cases alimony

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potence, bigamy, and fraud); OKLA. STAT. ANN. tit. 12, § 1271 (1961) (impotence and fraud); PA. STAT. ANN. tit. 23, § 10 (1955) (impotence, bigamy, consanguinity, and fraud); TENN. CODE ANN. § 36-801 (1955) (impotence and bigamy).

78. TENN. CODE ANN. § 36-801 (1955).

79. MISS. CODE ANN. § 2735 (1956).

80. *See* J. RISK, MARRIAGE—CONTRACT AND SACRAMENT 108 (1957); Snee, *The Canon Law of Marriage: an Outline*, 35 U. DET. L.J. 309, 365 (1958).

81. This would probably include most of the traditional grounds for annulment, but it would also suggest a more stringent application of some of them, particularly fraud.

82. Mere consummation of the defective marriage would not be "actual assumption of the marital status." The controlling facts would be whether in the eyes of the community the parties have assumed the obligations of this status. Material evidence would include: whether the parties cohabited; length, continuity and openness of any cohabitation; whether the parties became economically interdependent.

would not be justified and there would seldom be any need for division of property. Of course, if a child has been born, matters of custody and support must be determined. Provision should be made for all these matters, but it should be made clear that discretion to grant alimony and divide property is to be sparingly exercised. This redefinition of annulment would be impractical in those jurisdictions where annulment serves primarily as a means of avoiding unrealistic divorce laws. The problem of legislation which fails to correspond to the desires of the affected populace cannot be solved by simply attempting to remove those devices used in practice to circumvent it. But where there is no reason to anticipate use of the statutory scheme for such purposes, restricted annulment procedures would serve a valuable function.[83]

83. For a more thorough consideration of the annulment law in a number of states see Anderson, *Annulment of Marriage in Missouri,* 21 MO. L. REV. 119 (1956); Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment,* 2 MD. L. REV. 211 (1938); Note, *The Effect of Void and Voidable Marriages in Arkansas,* 10 ARK. L. REV. 188 (1956); Note, *Annulment in Florida,* 3 FLA. L. REV. 339 (1950); Note, *Annulment of Marriages: An Analysis of Indiana Law,* 33 IND. L.J. 80 (1957); Note, *Mississippi's Recent Annulment Act,* 34 MISS. L.J. 104 (1962); Note, *Annulment Problems in Ohio,* 4 W. RES. L. REV. 73 (1952).